OEDCA DIGEST

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SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include disability discrimination, harassment (both sexual and non-sexual), pregnancy discrimination, constructive discharge, and the "reasonable suspicion" standard used in making timeliness determinations.

Also included in this issue is an article addressing the accommodation of employees with impairments that may not qualify as a "disability."

The *OEDCA DIGEST* is now available on the internet at: http://www.va.gov/orm/newsevents.htm.

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I

PROOF OF DISABILITY, BY ITSELF, NOT SUFFICIENT TO PROVE DISCRIMINATION

When employees allege intentional discrimination, they need to prove more than just the existence of a disability, as the following case illustrates.

An employee [hereinafter the "complainant"] was hired as a program Support Clerk in the facility's Release of Information unit. His job involved processing requests for information. Specific tasks involved data entry in the computer system, securing medical and administrative records, evaluating the validity of requests, and responding to requests in writing. He also responded to telephone requests and assisted persons who appeared in his unit seeking information or assistance.

His duties were almost exclusively sedentary and required minimal physical effort. He was not required to pass a physical examination to obtain the position.

Prior to being hired, the complainant attended and completed a nine-month training course, including an internship, on medical records, and he obtained a certification as a Medical Records Specialist. He also has a BA degree in Psychology, and has more than 20 years experience as a Respiratory Therapist. After he was hired, he was given individual one-on-one training by a co-worker, which included applicable rules and regulations, proper manner of input and access of information, answering calls and questions, and other aspects of the job.

Within a month of his hire, the trainer approached his supervisor expressing frustration at not being able to train the complainant. She reported that he refused to take notes when she was giving him instruction, and that he was either unwilling or unable to retain the information imparted to him. He repeatedly asked the same questions, and all of his work had to be redone. He failed to verify the validity and scope of medical releases before responding to inquiries, and all of his correspondence had to be rewritten. He was able to produce only a small fraction of the responses required each day.

In response to these reports, the supervisor reassigned him to handle only telephone inquiries and "walk-in" assistance. He exhibited many of the same problems in this assignment, and the supervisor twice had to intervene-once to prevent him from releasing medical information to a caller, and another time to calm down a veteran patient because the complainant had provided incorrect information.

After two months, the supervisor determined that the complainant was unable to perform the duties of the position at an acceptable level of proficiency. She notified him that he would

be terminated, after which he submitted his resignation. He thereafter filed an EEO complaint alleging that his forced resignation (*i.e.*, constructive discharge) was due to his disability.

An EEOC administrative judge found no merit to the complainant's claim, and OEDCA took final action by accepting the judge's finding of no discrimination. The complainant did prove that he is disabled. His medical records disclosed numerous physical impairments involving his legs, knees, hips, and back, all of which resulted in significant job restrictions relating to lifting, carrying, standing, walking, pushing, pulling, climbing, kneeling, squatting, bending, and crawling. In combination, these impairments significantly limited his ability to walk, lift, and perform manual tasks.

Nevertheless, his position required no physical activity, and none of his restrictions prevented him from doing any tasks associated with his position. Moreover, the reasons for his dismissal involved performance deficiencies unrelated to any of his physical conditions.

The complainant in this case managed to prove only that (1) he was subjected to an adverse personnel action, and (2) he is disabled. To prove disability discrimination, however, the complainant would have had to prove by a preponderance of the evidence that his removal was due to his disability.

II

EMPLOYEE WITH BI-POLAR DISORDER NOT DISABLED

This is another case illustrating that a medical condition – even a very serious one – will not automatically be considered a disability for purposes of *The Rehabilitation Act*.

The complainant, a Licensed Practical Nurse, has a history of atypical Bipolar disorder, the symptoms of which include significant mood swings and poor stress accommodation. He takes medication and admits that the medication is effective in controlling his symptoms. He further admits that his condition does not affect any of his major life activities as long as he is taking his medication, <u>except</u> that he is unable to work on one particular unit at the hospital because of the nature of the work there – caring for terminal patients. He testified that such work was too stressful and aggravated his symptoms, even while taking medication.

Management officials testified that the complainant was assigned to that unit on a day shift because he had less seniority than other nurses who were being reassigned at the time, and because he had requested that he not be assigned to night or rotating shift work. The complainant filed a complaint alleging that the Nursing Service was refusing to accommodate his disability.

In order for a medical condition to be considered a disability, it must "substantially limit a major life activity." The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, taking into account any mitigating measures such as medicines or assistive or prosthetic devices.

Inasmuch as the complainant stated that his medication controlled his symptoms, and that he was not substantially limited in any major life activities, except working on one particular unit, the question then becomes whether the major life activity of working is substantially limited. OEDCA concluded that it was not.

An individual's inability to perform a *particular job or task* is not dispositive. Instead, the trier of fact must look to the number, type, and array of jobs from which the individual may be disqualified because of the condition. If the limitation claimed is that of working, an individual must demonstrate that he or she is significantly restricted in the ability to perform either (1) a class of jobs, or (2) a broad range of jobs in various classes compared to the average person having comparable training, skills, and abilities.

It was clear from the facts in this case that the complainant was not restricted with regard to either category. His restriction was limited to not being able to work on <u>one</u> particular unit, which did not substantially limit his ability to work as an LPN or, for that fact, in most other jobs.

OEDCA, the EEOC, and the courts have reached a similar result when confronted with disability claims involving job-related stress or anxiety. Individuals advancing such claims typically allege that they are substantially limited in their ability to work because either the job itself is too stressful, or a demanding or unreasonable supervisor causes too much stress. They typically request accommodation in the form of a reassignment to another job, or a new supervisor.

The problem with such claims is that the claimants are in effect admitting that their condition is a "disability" only with respect to one particular job or, in an even more narrow sense, to one particular supervisor. In most cases, the medical testimony establishes that the symptoms of the condition will disappear if the individual is removed from a specific work environment. Such job-specific limitations will not qualify as "substantial limitations" on the ability to work and, hence, will not be considered a disability under *The Rehabilitation Act*. Therefore, an employer would be under no legal obligation to accommodate such conditions.

III

AGE-RELATED COMMENTS NOT

SUFFICIENT TO PROVE AGE DISCRIMINATION IN REMOVAL OF PHYSICIAN'S SURGICAL PRIVILEGES

In many cases, derogatory comments relating to an individual's race, gender, age, religion or other protected category can be powerful evidence in support of a discrimination claim. In some cases, however, such evidence may not be sufficient to prove that the personnel action in question was caused by the individual's protected status. The following case illustrates why.

The complainant was a 77-year-old surgeon during the relevant time frame. Beginning in late 2001, his supervisors began having concerns after reviewing his most recent morbidity and mortality rates ("M & M"). The complainant had higher than normal M & M rates. The calculation of such rates is a normal part of the credentialing and recredentialing process. A review was ordered and the complainant was instructed not to schedule any surgeries until the issue was resolved. The complainant ignored the instruction and attempted to schedule two cases, but his attempt failed. He then performed a debridement (surgical removal of scarred or lacerated tissue) in a treatment room, which is a nonsterile environment.

The complainant's superiors met with him and offered him the opportunity to update his skills, but he rejected the offer. They then notified him that a formal peer review would be conducted. Such a review entails the examination of patient records and interviews of nurses and doctors at the hospital.

The review disclosed numerous problems, including lack of or questionable informed consent, lack of progress notes, treatment plans, and discharge summaries, concerns relating to surgical technique and short cuts during surgery, performing surgery in treatment rooms rather than operating rooms, operating without required assistance, high complication rates, concern over donor skin choices, and lack of evidence that the complainant has sought to upgrade his knowledge and skills.

As a result of the review, the complainant's surgeon privileges were revoked, but he was allowed to remain as a staff physician providing primary care. He then filed a discrimination complaint alleging, among other things, that the peer review and subsequent removal of his privileges were the result of age discrimination. As evidence, he pointed to alleged reports that staff members were calling him "senile", "old", and "blind."

Following a hearing, an EEOC administrative judge ruled that the complainant had failed to prove by a preponderance of the evidence that the complainant's age caused the peer review and resulting loss of surgery privileges. The judge noted that the surgeon who conducted the review was

not aware of the complainant's age, and testified credibly that he had never made nor heard such comments, and that he thought he was older than the complainant was. Moreover, the complainant's superiors who removed his privileges testified credibly that they had never made nor heard such comments. Finally, the complainant admitted that the alleged remarks were not made in his presence and he was unable to identify the staff members who allegedly made them.

In reaching his decision, the judge correctly noted that, even assuming the alleged comments had been made by some staff members, there was no evidence that they had any bearing on the peer review process and subsequent removal of privileges. In other words, there was no evidence connecting those comments to anyone involved in that process. This, coupled with the complainant's failure to rebut any of the review findings, compelled a finding of no discrimination.

IV

VA LIABLE FOR SUPERVISOR'S SEXUAL HARASSMENT OF SUBORDINATE EMPLOYEE

The complainant worked as a GS-4 Security Clerk in the Police and Security Service at a VA hospital. Several female employees stated that the climate in the Service was hostile due to frequent conduct of a sexual nature on the part of the Police Chief and other male officers. Despite this environment, the complainant did not report her concerns to anyone, believing it would do no good and might only result in retaliation against her. Her belief was reasonable, as no action was taken when other women in the Service had previously complained of sexual harassment.

The complainant was called to active duty and served for about a year in Bosnia. When she returned to the VAMC, she was assigned to the night shift. This assignment posed a significant problem insofar as caring for her child, resulting in her former husband requesting and obtaining temporary custody of the child. In order to regain custody, she requested a day shift position. The Chief temporarily assigned her to a vacant Secretary position on the day shift, but told her that if she wanted it on a permanent basis, it would "cost" her. When she asked him to clarify, he replied that she would have to hug him every morning.

Thereafter, he regularly tried to hug and kiss her. She resisted his advances, but she did not report his conduct to anyone because she needed the job. Eventually, the VAMC issued a vacancy announcement for the position to which she had been temporarily assigned. After applying, the Chief called her to his office and told her that the position was hers, but she had to pay for it. He then began fondling her and forcing her to fondle him. When the complainant began to cry, he stopped, apologized, and ex-

plained that he was just lonely and had a "serious crush" on her. He promised never to treat her that way again.

Upset by the incident, the complainant went to the Women's Clinic, and disclosed the details of what happened to a female physician who encouraged her to report the incident and seek help from a social worker. She declined to do so, thinking she could manage the problem.

Nine days after this incident, the Chief began interviewing applicants for the position. He scheduled the complainant's interview last. When she entered his office for the interview, he asked her a few routine questions and then told her that she had the job. He then said that there were still 30 minutes remaining in the interview, approached her, pushed her to the corner of his desk, and forcibly had sexual intercourse with her. He told her that this was payment for getting the job, and instructed her to relax because it would only be a "one-time deal." The complainant submitted unwillingly, but did not forcibly resist.

When she left his office, she reported the incident to officials in the Women's Clinic, who then transported her to a rape center at a nearby hospital, where she underwent testing for STDs and AIDS. She then reported the incident to law enforcement authorities and then to agency officials, including an EEO Counselor.

The VAMC Director, immediately upon learning of the incident, placed the Chief on leave status, pending completion of an investigation. A few days later, the Chief resigned. Because he resigned, the Director was unable to take any adverse personnel action against him.

Eventually, following an FBI investigation and a two-count criminal information filed by the Unites States Attorney's Office, the former Chief pled guilty pursuant to a plea agreement.

OEDCA issued a final agency decision finding the Department liable for sexual harassment and later awarded a significant amount of monetary ("compensatory") damages for complainant's emotional pain and suffering.

It was not clear from the record before OEDCA why this case was not settled. One reason may be that the complainant was unwilling to settle. Another possible explanation is that local officials may have been of the opinion that they would not be held liable because they had acted promptly and appropriately upon learning of the incident. While prompt, effective, and appropriate action may absolve an employer from liability for sexual harassment committed by coworkers, the harassment in this case was committed by a supervisor and involved a tangible employment action. Hence, the Department was automatically liable for the supervisor's misconduct regardless of any actions taken by

management to address and correct the problem.

V

PREGNANCY NOT A DISABILITY

The complainant, a registered nurse in an intensive care unit ("ICU"), filed a complaint alleging, among other things, that management failed to accommodate her disability (pregnancy) by refusing to adjust her scheduled tour of duty to reflect the medical restrictions imposed by her physician.

Because of a previous miscarriage, her physician had imposed a 25-pound lifting restriction and recommended she work eight fewer hours per week. These restrictions were later removed when she delivered her child.

Management officials claim, and the evidence demonstrated, that they never required the complainant to work beyond her limitations.

After reviewing the investigative record, an EEOC judge issued a summary judgment, finding that the complainant's failure to accommodate claim failed for several reasons, not the least of which was the fact that she was not disabled. Claims of discrimination based on pregnancy are not treated under the law as claims of disability discrimination. Rather, they are considered to be claims of gender discrimination under the *Pregnancy Discrimination Act of 1978*, an amendment to *Title VII of the Civil Rights Act of 1964*. Unlike *The Rehabilitation Act* and *The Americans with Disabilities Act,* which may sometimes require that disabled employees receive preferential treatment in the form of reasonable accommodation, the PDA does not require preferential treatment for a pregnant employee. It only requires the same treatment as non-pregnant employees would receive who are similar in their ability and inability to work.

Because pregnancy is a temporary condition unique to women, the proper inquiry is whether the pregnant employee has been treated differently than other temporarily disabled employees, male or female. If so, she has been treated differently because of her pregnancy, hence, because of her gender. The principle is one of equal treatment, not preferential treatment. Thus, employers can treat a pregnant employee badly, provided they do not treat other employees with temporary disabilities more favorably.

In this case, as the complainant's claim was based on her pregnancy, management was under no legal obligation to accord her preferential treatment in the form of an accommodation. Moreover, the judge found no evidence that the complainant was treated less favorably than were other temporarily disabled employees. The evidence showed that she was allowed to work within the restrictions suggested by her physician, including eight fewer hours per week.

VI

EMPLOYEE WHO QUIT JOB ONLY AFTER FINDING NEW JOB AND GIVING TWO WEEKS NOTICE NOT "CONSTRUCTIVELY DISCHARGED"

It is not uncommon for employees to file a discrimination complaint after resigning their position and claim that they quit because of intolerable working conditions caused by discrimination. Such complaints are known as "constructive discharge" claims. To prevail on such a claim an employee must prove by preponderant evidence that (1) a reasonable person would have found the working conditions intolerable, (2) the intolerable conditions were caused by unlawful discrimination, and (3) the resignation (or retirement) was caused by the intolerable conditions.

In a recent case, both an EEOC judge and OEDCA concluded that the employee failed to prove any of the above elements of proof. The employee resigned and later claimed that she was "forced" to do so because of a hostile environment caused by her race (Native American and Filipina). The specific incidents or events she cited as evidence of this hostile environment included the following: she failed to receive a performance appraisal for one rating period, there was a delay in her receipt of a bonus, her supervisor yelled at her on two occasions and warned her that she could be fired, she was denied computer training, she was denied tuition reimbursement for some graduate school courses in which she had enrolled, and management refused to accommodate her work schedule so she could attend her graduate school classes.

After reviewing the evidence, the judge concluded that the events either did not occur as alleged, or that management's actions were justified. The judge further found no evidence of racial bias or hostility and concluded that the events complained of did not create an intolerable work environment but, rather, were of the type one would normally expect to encounter or experience in the workplace. Hence, the judge found that a reasonable person in this situation might have been disappointed or upset, but would not have felt compelled to resign.

Further evidence of this is seen in the fact that the complainant had been looking for a new job for some time, and that she quit only after finding one and giving two weeks notice. Again, this would tend to suggest that, while she may have been unhappy, dissatisfied, and wanting a job change, the environment was apparently not so hostile as to make her quit before finding a new job.

Constructive discharge claims are often difficult to prove absent evidence of discriminatory and egregious conduct that a reasonable person would find unbearable such as, for example, severe or pervasive sexual harassment, or a workplace permeated with

racially derogatory comments. Moreover, even when such an environment exists, the complainant must also prove that it was that environment, and not some other factor, such as, for example, a better paying job elsewhere or a spouse's transfer to another state, that prompted the resignation or retirement.

VII

RUDE OR INAPPROPRIATE BEHAVIOR BY SUPERVISOR NOT NECESSARILY "HARASSMENT"

This case is not unlike many claims of "harassment" filed by Federal employees against their supervisors. It illustrates the fact that simply because an employee finds his or her supervisor difficult or rude does not mean that the employee is being subjected to a "hostile environment."

The employee in this case, an Administrative Assistant [hereinafter "complainant"], was accused of mismanaging pre-employment drug screening by using incorrect forms. In addition to the accusation, she claims that her supervisor raised her voice above a civil tone, and after finding the correct forms, raised them above her shoulder and slammed them on the desk, demanding that complainant redo the drug screen and "do it right."

In response, the complainant filed an EEO complaint alleging that the supervisor's conduct was motivated by racial considerations, was "harassing" in nature, and caused a "hostile work environment".

An EEOC judge spent little time disposing of these claims. Even assuming for the sake of argument that the incident occurred exactly as the complainant alleged, the judge concluded that this one incident failed to state claim of harassment. Harassment claims, by definition, generally must involve a series of events or incidents occurring over a period of time. Complainants must satisfy the "severe or pervasive" test, which means they must show either that the incidents occurred so frequently as to create a hostile environment, or that the incidents, though not frequent, were sufficiently egregious in nature that a hostile work environment resulted. In rare cases, a single incident, if sufficiently egregious, may suffice to state a claim of harassment; *e.g.*, racially derogatory remark by a supervisor to a subordinate employee.

Obviously, in this case the complainant was unable to satisfy the "severe or pervasive" test, even assuming the alleged incident occurred, and even assuming she was reasonable in finding the supervisor's conduct unjustified and inappropriate. Moreover, even if she did satisfy the test, she presented no evidence that the supervisor's conduct was racially motivated. Hence, she was unable to prove her claim of harassment, and she was unable to prove her disparate treatment claim, *i.e.*, that the order to redo the

screen was discriminatory.

"Harassment" (nonsexual) is the most frequently raised issue in Federal sector employment discrimination claims. Over 20% of all claims filed include an allegation of harassment. Very few of these claims are successful before the EEOC, OEDCA, or the courts. The reason is that many employees believe that harassment consists of anything in the workplace that displeases or upsets them. Employment discrimination law, however, defines harassment far more restrictively. Proving such a claim requires a showing that the conduct or incidents in question were sufficiently severe or pervasive as to create a hostile or abusive work environment, and that such an environment was caused by a prohibited factor, such as race, gender, age, *etc.* [1]

As this case clearly demonstrates, civil rights laws are not intended to insulate employees from the normal trials and tribulations of the workplace, which may include having to put up with supervisors who are difficult, rude, or otherwise unsuited for their position.

VIII

COMPLAINT DISMISSED AS UNTIMELY DESPITE COMPLAINANT'S CLAIM SHE DID NOT HAVE "REASONABLE SUSPICION"

Before an individual is permitted to file a formal, written complaint of discrimination, he or she must first raise the matter with an EEO Counselor. EEOC's regulations require that the individual contact a Counselor with 45 calendar days of the occurrence of the matter giving rise to the complaint, or in the case of a personnel action, within 45 days of the effective date of the personnel action. Failure to do so could result in dismissal of the complaint. As the following case illustrates, it is not always clear what event will trigger the start of that 45-day clock.

The complainant applied and was interviewed for a GS-9 Rating Veterans Service Representative position. The HR Director subsequently approached the complainant and requested that she withdraw her application, as it contained a false statement; to wit, that she did not have any criminal convictions. The HR Director advised her that such a conviction was noted – by means of a coded entry -- on her DD 214 (military discharge/separation certificate), and that the conviction rendered her ineligible for that position.

The complainant objected, asserting vigorously that she had no criminal convictions. Nevertheless, she requested withdrawal of her application to avoid further investigation, and the HR Director immediately returned her application package to her.

[1] Some courts also require a showing that the verbal or physical conduct in question be directly related to the type of discrimination alleged; for example, a racial harassment claim must include evidence of racial comments, jokes, or other racially offensive conduct.

Five months later, while at home filing some papers, she found a note in her application package written by someone in HR advising the HR Director to make certain there was an actual conviction to avoid difficulties with the complainant. The discovery of this note, five months after the HR Director had returned the file to her, prompted the complainant to contact an EEO Counselor and allege that the HR Director discriminated against her on account of her race and age.

The question before an EEOC administrative judge was whether the complaint should be dismissed as untimely in view of the complainant's failure to contact the EEO Counselor within 45 calendar days of the return of her application package. The VA argued that the complainant was untimely. The complainant argued that she was not untimely, as the 45-day clock did not begin to run until her discovery of the note in her application package. In other words, she was claiming that she did not have a "reasonable suspicion" that discrimination occurred until she saw that note.

The judge ruled in the VA's favor, finding that the complainant had, or should have had cause for concern regarding the HR Director's assertion about a criminal conviction, and that she should have reviewed the application package immediately upon receiving it to determine the information on which he relied. It was clear from the record that the complainant questioned the accuracy of the conviction information as soon as the HR Director told her about the coded information on her DD-214. Hence, a reasonable person in the complainant's shoes would not have waited so long to review the file.

IX

ACCOMMODATING EMPLOYEES WITHOUT DISABILITIES

The following article is reproduced with permission of "FEDmanager", a weekly e-mail newsletter for Federal executives, managers, and supervisors published by the Washington, D.C. law firm of Shaw, Bransford, Veilleux, and Roth, P.C.

At some point, you, as a federal manager, may find yourself supervising an employee whose job performance or attendance suddenly deteriorates. Sometimes, the change in the employee's behavior is caused by the onset of a mental or physical impairment. Your job as a manager, then, is to balance the employee's right to be accommodated with the need to accomplish the agency's day-to-day operations. In certain situations, the result may be an adverse performance action against the employee, or, as is becoming more prevalent, with the employee's application for disability retirement.

But what about those cases that are not quite so severe? While such cases also require a balanced approach, managers and supervisors can often

find solutions that are not only in the best interests of the employee, but also translate into increased productivity for the agency.

The law is clear that agencies have an obligation to make a reasonable accommodation for a qualified disabled employee, unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. The technical definition of a disabled employee is one who has, or is regarded as having, a mental or physical impairment which significantly limits one or more of the employee's life activities, such as walking, seeing, hearing, speaking, breathing, learning, working, or caring for oneself.

Sometimes an employee may not meet this definition, but managers and supervisors can make small accommodations that can make a world of difference for their employees. For instance, medical conditions affecting an employee's back, neck, or wrists may be alleviated with the purchase of a new chair, desk, or computer equipment. For a relatively low cost, the manager can both increase the employee's productivity and build goodwill.

If one of your employees needs an accommodation, talk it over with your Human Resources and General Counsel's office to develop a plan of action. Often, a little creativity and discussion - without getting too technical about legal entitlements - can turn a potentially unpleasant situation into a positive one for both the employee and the agency.

(*Editor's Note: OEDCA fully agrees with the above suggestion. As a cautionary note, however, when an employer grants an accommodation for the reasons noted above without requiring medical evidence establishing the existence of a disability, the employer should always document that it is not conceding that the employee has a disability, and that by granting the accommodation under such circumstances, it is doing more than the law requires. Such documentation might prove useful at a later date.*